IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

CHICOT COUNTY DRAINAGE DISTRICT ..... *Petitioner,*

v. No. 122

THE BAXTER STATE BANK AND
MRS. LENA S. SHIELDS ..... *Respondents.*

BRIEF FOR PETITIONER, CHICOT COUNTY DRAINAGE DISTRICT

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A.

B.

OPINIONS BELOW

Opinion of the District Judge is not reported. It consists only of findings of fact and conclusions of law (R. 74-79). Opinion of the Circuit Court of Appeals, Judge Gardner, appears in 103 Fed. (2d) 847 (R. 85), and the dissenting opinion of Judge Woodrough appears 103 Fed. (2d) 849 (R. 89).

C.

JURISDICTION

Certiorari to the Circuit Court of Appeals for the Eighth Circuit was granted October 9, 1939 (R. 98), ___ U. S. ___, ___ L. Ed. ___.

To save prolixity, reference to the petition therefor is made.

D.

STATEMENT OF THE CASE

The petitioner, Chicot County Drainage District, is a local improvement district located in Chicot County, Arkansas. It was duly organized under and by virtue of Act No. 405 of the Extraordinary Session of the General Assembly of Arkansas of 1920, approved February 20, 1920, as amended by Act 432 of the Acts of the General Assembly of the State of Arkansas of 1921, and under the General Drainage Law of Arkansas approved May 27, 1909 (R. 75).

The respondents are the owners of fourteen bonds in the face amount of $1,000 each issued by the District in 1924 (R. 75).

On June 17, 1935, the District filed a petition in the United States District Court for the Western Division of the Eastern District of Arkansas, wherein it asked for authority to effect a plan of readjustment of its indebtedness (Defendant's Finding of Fact No. 3, R. 76). This action was entitled "In the Matter of Chicot County Drainage District, Bankrupt," and was cause number 4357 in said court (R. 76). It will be referred to hereafter as the bankruptcy case. It was filed under authority of the First Municipal Bankruptcy Act, 48 Stat. at L. 798, Chapter 345, (U.S.C.A. Title 11, Section 303). The provisions of the act were fully complied with (Defendant's Finding of Fact No. 5, R. 77). Respondents had actual notice of the proceedings (Defendant's Finding of Fact No. 4, R. 77). On March 28, 1936, the District Court entered a final decree in the above-mentioned bankruptcy case, approving the plan of debt readjustment (R. 49). Said decree, after providing for a discharge of the District's indebtedness

for about 36 cents on the dollar, provides, in part, as follows:

> "(c) That all the old bonds and other obligations of the petitioning District affected by the plan of debt readjustment approved in this cause, whether heretofore surrendered and cancelled or remaining outstanding, and by whomsoever held, are hereby cancelled, annulled and held for naught as enforceable obligations of the petitioning district except as herein provided, and that the holders thereof be and they are hereby forever restrained and enjoined from otherwise asserting any claim or demand whatsoever therefor as against the petitioning district or its officers, or against the property situated therein or the owners thereof;" (R. 52).

Bondholders of the District holding $705,087.06 face amount of said bonds accepted the proposed plan of debt readjustment and were paid off in accordance with said plan. The holders of $57,449.37 face amount of bonds had not, at the time the final decree was entered, accepted said plan and the District was required to deposit with the clerk of the court the sum of $20,603.10 in order that the clerk might pay said bonds when they were deposited with him for that purpose (R. 48). The fourteen bonds represented in the present suit are part of those which were not deposited in accordance with the plan. Neither of the respondents appealed from said decree (Defendant's Finding of Fact No. 9, R. 78).

Thereafter, and on May 25, 1936, this court, in the case of *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513; 56 Sup. Ct. 892, 80 L. Ed. 1309, held that the First Municipal Bankruptcy Act was unconstitutional, in so far as it applied to political subdivisions of the states.

On July 24, 1937, sixteen months after the bankruptcy decree and fourteen months after the decision in the Ash-

ton case, the respondents instituted this action, seeking judgment against the petitioner for the full face amount of their fourteen bonds, together with all past due interest (R. 1-4). The District pleaded as *res judicata* the final decree of the District Court in the bankruptcy case hereinbefore mentioned (R. 5-11). On June 2, 1938, the District Court rendered judgment in favor of the respondents for the full amount prayed in the complaint (R. 12).

This action was taken by the trial court on the theory that the District Court in the bankruptcy case had no jurisdiction of the parties plaintiff or of the subject-matter, and that its decree was therefore void for the reason that the act upon which it was founded was unconstitutional (R. 13).

In the meantime, and on the 16th day of August, 1937, the Second Municipal Bankruptcy Act became a law, 50 Stat. at L. 654, Chapter 657, (U.S.C.A. Title 11, Section 401); and on the 25th day of April, 1938, this court in the case of *United States* v. *Bekins, et al.*, 304 U. S. 27; 58 Sup. Ct. 811, 82 L. Ed. 1137, held that said act was constitutional and valid.

The case was appealed to the Circuit Court of Appeals for the Eighth Circuit, and on April 29, 1939, said court affirmed the judgment of the District Court (R. 85), Judge Woodrough dissenting (R. 89), 103 Fed. (2d) 847. Petition for rehearing was denied on May 18, 1939 (R. 97).

The Honorable Circuit Court of Appeals, in its opinion, stated: "The decree entered was a nullity and constituted no defense to plaintiff's action" (R. 89).

The case is now in this court by writ of certiorari, the petition for the writ having been granted on October 9, 1939.

The District submits that the holding of the Circuit Court of Appeals and that of the District Court to the ef-

fect that the decree entered in the bankruptcy case is void is erroneous and untenable. It is submitted that at the time the bankruptcy decree was entered the District Court had jurisdiction, that its decree is valid and binding, that it is not subject to collateral attack, and that it is *res adjudicata* of the issues involved in this case.

E.

SPECIFICATION OF ERRORS WHEREON RELIANCE WILL BE PLACED

Specification I.

The lower court erred in holding that the decree of the United States District Court for the Eastern District of Arkansas, Western Division, under date of March 28, 1936, was void and did not constitute a defense to this action.

F.

SUMMARY OF THE ARGUMENT

Specification I.

The lower court erred in holding that the decree of the United States District Court for the Eastern District of Arkansas, Western Division, under date of March 28, 1936, was void and did not constitute a defense to this action.

Point A. THE CASE CULMINATING IN THE DECREE OF MARCH 28, 1936, WAS BETWEEN THE SAME PARTIES AND INVOLVED THE SAME ISSUES AS ARE PRESENTED IN THE CASE AT BAR

Baker v. *Cummings*, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776 (1901);

Dowell v. *Applegate*, 152 U. S. 327, 345, 14 S. Ct. 611, 38 L. Ed. 463, 470 (1894);

Johannessen v. *United States*, 255 U. S. 227, 238, 32 S. Ct. 613, 56 L. Ed. 1066, 1070 (1911);

Myers v. *International Trust Co.*, 263 U. S. 64, 73; 64 S. Ct. 77, 68 L. Ed. 165, 169 (1923);

Reed v. *Allen*, 286 U. S. 191, 52 S. Ct. 532, 76 L. Ed. 1054 (1932).

Point B. THE BANKRUPTCY DECREE IS NOT WHOLLY VOID

Arnold v. *Booth*, 14 Wis. 180 (1861);

Ashton v. *Cameron County Water Improvement District*, 298 U. S. 513, 56 S. Ct. 892, 80 L. Ed. 1309 (1936);

Aurora v. *West*, 7 Wall. 82, 19 L. Ed. 42 (1869);

Buckmaster v. *Carlin*, 3 Scammon (Ill.) 104 (1841);

Chicago Life Insurance Co. v. *Cherry*, 244 U. S. 25, 29, 37 S. Ct. 492, 61 L. Ed. 966, 969 (1917);

Christiansen v. *Mendham*, 45 App. Div. 554, 61 N. Y. S. 326, 327 (1899);

Cromwell v. *Sac County*, 94 U. S. 351, 24 L. Ed. 195 (1877);

Cutler v. *Huston*, 158 U. S. 423, 15 S. Ct. 868, 39 L. Ed. 1040 (1895);

Dowell v. *Applegate*, 152 U. S. 327, 345, 14 Sup. Ct. 611, 38 L. Ed. 463, 470 (1894);

Gila Bend Reservoir & Irrig. Co. v. *Gila Water Co.*, 205 U. S. 279, 27 S. Ct. 495, 51 L. Ed. 801 (1907);

Hartford Life Insurance Co. v. *Johnson*, 268 Fed. 30 (1920);

Herndon v. *Moore*, 18 S. C. 339 (1882);

In Re Greyling Realty Corporation, 74 Fed. (2d) 734 (C.C.A. 2nd, 1935) cert. den. 294 U. S. 725, 55 S. Ct. 639, 79 L. Ed. 1256;

King v. *Poole*, 36 Barb. 242, 244 (N. Y., 1862);

United States v. *Bekins, et al.*, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137 (1938);

Manley v. *Park*, 62 Kan. 553, 64 Pac. 28, 30 (1901);

McWilliams v. *Blackard*, 96 Fed. (2d) 43, 45, 46 (1938);

Peyton v. *Peyton*, 28 Wash. 278, 68 Pac. 757, 764 (1902);

Putman v. *Murden*, 97 Ind. App. 313, 184 N. E. 796 (1933);

Rooker v. *Fidelity Co.*, 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923);

Schumpert v. *Smith*, 18 S. C. 358 (1882);

Stoll v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 116 (1938);

Texas & P. R. Co. v. *Gulf C. & S. F. R. Co.*, 270 U. S. 266, 274, 46 S. Ct. 763, 70 L. Ed. 578, 582 (1926);

Thomas v. *Poole*, 19 S. C. 323 (1882);

Watertown v. *Eastern Dakota Electric Co.*, 296 Fed. 832 (C.C.A. 8, 1924);

Woods Bros. Construction Co. v. *Yankton County*, 54 Fed. (2d) 304 (C.C.A. 8, 1931);

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15 Corpus Juris 854.

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48 Stat. at L. 654; Chapter 657 (U.S.C.A. Title 11, Sections 301-303).

Federal Constitution, Article 1, Section 8; Article 3, Section 1.

50 Stat. at L. 654, Chapter 657 (U.S.C.A. Title 11, Sections 401-404);

U.S.C.A. Title 11, Section 207.

Point C. **THE CONSTITUTIONAL OBJECTIONS WHICH EXISTED IN THE ASHTON CASE WERE NOT PRESENT IN THE BANKRUPTCY CASE AT ISSUE HERE, AND EVEN IF SAID OBJECTIONS WERE PRESENT, THE RESPONDENTS COULD NOT HAVE RAISED THEM UPON DIRECT APPEAL**

Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8, 22; 52 S. Ct. 103; 76 L. Ed. 136, 145 (1931);

Brush v. *Commissioner of Int. Rev.*, 300 U. S. 352, 368; 81 L. Ed. 691, 698 (1937);

Champlin Refining Co. v. *Corporation Comm.*, 286 U. S. 210, 234, 238; 52 S. Ct. 559; 76 L. Ed. 1062, 1078, 1080 (1932);

Drainage District No. 2 of Crittenden County, Ark., v. *Mercantile Commerce Bank & Trust Company*, 69 Fed. (2d) 138 (C.C.A. 8, 1934), cert. den. 293 U. S. 566, 55 S. Ct. 77, 79 L. Ed. 665;

Drainage District No. 7 of Poinsett County v. *Hutchins*, 184 Ark. 521, 530, 42 S. W. (2d) 996, 1,000 (1931);

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 583; 57 S. Ct. 524; 81 L. Ed. 814, 819 (1937);

In re Drainage District No. 7 of Poinsett County, Arkansas, 21 Fed. Sup. 798, 803 (1937);

Iroquois Transp. Co. v. *De Laney Forge & Iron Co.*, 205 U. S. 354, 360; 27 S. Ct. 509; 51 L. Ed. 836, 840 (1907);

Luehrmann et al. v. *Drainage District No. 7 of Poinsett County, Arkansas*, 104 Fed. (2d) 696 (C.C.A. 8, 1939);

New York Ex Rel. v. *Kleinert*, 268 U. S. 646, 45 S. Ct. 618, 69 L. Ed. 1135 (1925);

Supreme Forest Woodmen Circle, et al., v. *City of Belton Texas*, 100 Fed. (2d) 655 (C.C.A. 5, 1938);

Utah Power & Light Co. v. *Pfast*, 286 U. S. 165, 186; 52 S. Ct. 548; 76 L. Ed. 1038, 1049 (1932);

Wong Tai v. *U. S.*, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545 (1927);

Young v. *Masci*, 289 U. S. 253, 53 S. Ct. 599, 77 L. Ed. 1158 (1933);

Young v. *McNeal-Edwards Co.*, 283 U. S. 398, 400; 51 S. Ct. 538; 75 L. Ed. 1140, 1141 (1931);

STATUTES

50 Stat. at L. 654, Chapter 657 (U.S.C.A. Title 11, Sections 401-404);

U.S.C.A. Title 11, Section 303 (a), Sub-section (1).

D

ARGUMENT

Specification One

THE LOWER COURT ERRED IN HOLDING THAT THE DECREE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION, UNDER DATE OF MARCH 28, 1936, WAS VOID AND DID NOT CONSTITUTE A DEFENSE TO THIS ACTION

Point A

THE CASE CULMINATING IN THE DECREE OF MARCH 28, 1936, WAS BETWEEN THE SAME PARTIES AND INVOLVED THE SAME ISSUES AS ARE PRESENTED IN THE CASE AT BAR

Cause No. 4357 in Bankruptcy was a bankruptcy proceeding in the United States District Court for the Eastern District of Arkansas, Western Division. This proceeding was filed by the District, petitioner here, and all of its creditors, including the plaintiffs here, were made parties (Defendant's Finding of Fact No. 4, R. 77).

While a bankruptcy proceeding is partly *in rem*, nevertheless the bankrupt and the creditors are ordinary adversaries in a contest over a composition, and the rule of *res judicata* is just as applicable as in an ordinary civil suit between the parties. *Myers* v. *International Trust Co.*, 263 U. S. 64, 73; 64 S. Ct. 77; 68 L. Ed. 165, 169 (1923).

That suit involved the readjustment of the bonded indebtedness of the District (Defendant's Finding of Fact

No. 3, R. 76, 16). In other words, it involved the question as to whether the holders of the bonds issued by the District should be allowed to recover the full face amount of those bonds or whether the District could secure a release from its obligations by payment of a less amount. In short, it involved the liability of the District on the very bonds upon which the plaintiffs have now brought this action. The plaintiffs in this action were defendants in the former action, and the defendant in this action was the plaintiff in the former action. The two cases, therefore, involve the same parties and the same subject-matter, to-wit, the liability of the District upon the bonds now in question.

We quote from the final decree of the court in the bankruptcy case as follows (R. 52):

> "(C) That all the old bonds and other obligations of the petitioning district affected by the plan of debt readjustment approved in this cause, whether heretofore surrendered and cancelled or remaining outstanding, and by whomsoever held, are hereby cancelled, annulled and held for naught as enforceable obligations of the petitioning district, except as herein provided, and that the holders thereof be and they are hereby forever restrained and enjoined from otherwise asserting any claim or demand whatsoever therefor as against the petitioning district or its officers, or against the property situated therein or the owners thereof; and * * *"

Under these circumstances, the doctrine of *res judicata* applies.

> "The foundation of the doctrine of *res judicata*, or estoppel by judgment, is that both parties have had their day in court. 2 Black, Judgm. Sections 500, 504. The general principle was clearly expressed by Mr. Justice Harlan, speaking for this court in *Southern P. R. Co.* v. *United States*, 168 U. S. 1, 48, 42 L. Ed. 355, 377, 18 Sup. Ct. Rep. 18:

"'That a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.'"

Johannessen v. *United States*, 255 U. S. 227, 238, 32 Sup. Ct. 613, 56 L. Ed. 1066, 1070 (1911).

"'* * * a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.'"

Dowell v. *Applegate*, 152 U. S. 327, 345, 14 Sup. Ct. 611, 38 L. Ed. 463, 470 (1894).

The theory of the law is that matters which have once been fully investigated between the parties and determined by the court shall not be again contested, and that the judgment of the court upon matters thus determined shall be conclusive on the parties and never subject to further inquiry.

Baker v. *Cummings*, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776 (1901).

The case of *Reed* v. *Allen*, 286 U. S. 191, 52 Sup. Ct. 532, 76 L. Ed. 1054 (1932), demonstrates the extent to which the doctrine of *res judicata* applies. It was there held that where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as *res judicata*, although the first judgment be subsequently reversed. The court said:

"The predicament in which respondent finds himself is of his own making, the result of an utter failure to follow the course which the decision of this court in *Butler* v. *Eaton*, *supra*, had plainly pointed out. Having so failed, we cannot be expected, for his sole relief, to upset the general and well established doctrine of *res judicata*, conceived in the light of the maxim that the

> interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship. *United States* v. *Throckmorton*, 98 U. S. 61, 65, 68, 69, 25 L. Ed. 93, 96."

Therefore, since this case and the bankruptcy case involve the same issues and are between the same parties, the decree in the bankruptcy case is conclusive here unless the respondents are entitled to go behind said decree on the ground that the court rendering it was without jurisdiction.

In Point B of this brief we have argued that the District Court in the bankruptcy case had jurisdiction, and also that even if it did not, still the respondents cannot assert it in this case. In Point C we have pointed out that the constitutional objections to the First Municipal Bankruptcy Act which were present in the Ashton case were not present in the bankruptcy case involved here.

Point B

THE BANKRUPTCY DECREE IS NOT WHOLLY VOID

The judgment of the trial court in this case and that of the Circuit Court of Appeals are both based upon the proposition that the District Court in the bankruptcy case had no jurisdiction to render a decree, that its decree was therefore void, and wholly without effect.

In determining the question as to whether or not the District Court in the bankruptcy case had jurisdiction, the first question is whether the respondents here, the Baxter

State Bank and Mrs. Lena S. Shields, were properly before the court in the bankruptcy case. Chapter 9 of the Bankruptcy Act, U. S. C. A. Title 11, Paragraphs 301-303, it being what has been referred to as the First Municipal Bankruptcy Act, provides as follows in Paragraph 303(c):

> "(c) Upon approving the petition or at any time thereafter the judge (1) shall require the taxing district to give such notice as the order may direct to creditors, and to cause publication to be made at least once a week for three successive weeks, of a hearing to be held within ninety days after the approval of the petition for the purpose of considering the plan of readjustment filed with the petition and of any changes therein or modifications thereof which may be proposed."

The District gave notice as required by said section, and, furthermore, in accordance with the order of the court, mailed notice to the bondholders by registered mail, and the plaintiffs in this case received actual notice of such proceedings. (Defendant's Findings of Fact No. 4 and No. 5 and No. 9, R. 77, 78). This method of acquiring service over creditors in bankruptcy has been upheld. The provisions of U. S. C. A. Title 11, Paragraph 207, which relates to corporate reorganizations, are practically the same as the provisions above set out. Said section states that the court "shall cause reasonable notice of such determination and of all hearings for the consideration of any proposed plan for the dismissal of the proceedings or the liquidation of the estate, or the allowance of fees or expenses to be given creditors and stockholders by publication or otherwise."

In the case *In Re Greyling Realty Corporation*, 74 Fed. (2d) 734 (C.C.A. 2nd, 1935), certiorari denied, 294 U. S. 725, 55 Sup. Ct. 639, 79 L. Ed. 1256, the court passed upon

the validity of this method of acquiring jurisdiction, and, in its opinion, said:

> "It is argued that the District Court has not the power to issue its process throughout the United States. Section 77A of the Act (11 U.S.C.A., Section 206) provides that 'in addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in Section 77B (Sec. 207) of this chapter.' And Section 77B (a) expressly grants to the court approving the petition, during the pendency of the proceedings under this section exclusive jurisdiction of the debtor and its property wherever located for the purpose of the section. The power to issue its process throughout the United States in furtherance of the purposes of a centralized organization is an inevitable conclusion because of vesting such power in the District Court of primary jurisdiction. Section 77B (c) (10)."

The court further said:

> "In the absence of legislative provision, the mode of effecting service rests with the court, within the limitations of the authorities. *Flexner* v. *Farson*, 248 U. S. 289, 39 S. Ct. 97, 63 L. Ed. 250; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565. The mode and manner of effecting service was provided in the order of October 5, 1934, and afforded the appellants reasonable opportunity to be heard, and service of that order was made as the court prescribed. It became necessary for the court to make provision for such service because of the extension of the boundaries of the District Court in a proceeding under Section 77B. The previous rules respecting the issuance of process outside the territorial limits of the districts are inapplicable to proceedings under this new Bankruptcy Act."

The decision in the case of *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513, 56 S. Ct. 892, 80 L. Ed. 1309 (1936), did not comment upon the method of acquiring service over creditors of the bankrupt. That

case, as will be pointed out later in this brief, merely held that, in so far as the act extended benefits of the bankruptcy act to political subdivisions of a state, it was an unconstitutional encroachment upon state powers. That decision is, we submit, limited to the district involved in that case, which was specifically held to be a political subdivision of the State of Texas.

Furthermore, the second Municipal Bankruptcy Act, U.S.C.A. Title 11, Paragraphs 401-404, is not materially different from the first, in so far as its provisions with reference to acquiring service are concerned. The second act has been held to be a constitutional enactment in the case of *United States* v. *Bekins, et al.*, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137 (1938). In view of this, we take it that there can be no question but that the plaintiffs in this case, to-wit, the Baxter State Bank and Mrs. Lena S. Shields, were properly before the court in the prior bankruptcy action. At any rate, as was pointed out by Mr. Justice Reed in *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 116 (1938), the jurisdiction of the court over the parties is only a *quasi*-jurisdictional question and an adjudication may not be collaterally attacked on that ground.

The next consideration is whether the Federal District Court in the bankruptcy case had jurisdiction of the subject-matter. This requires a further examination of the decision in the Ashton case. The court did not hold in that case that the District Court was without jurisdiction. The opinion of the majority does not state that under no circumstances could relief be given to improvement districts or to municipal debtors. The court merely held that the act as written, in so far as it applied to political subdivisions of the

states, was an illegal interference by Congress with the control by the states of their own fiscal affairs and of those of their political subdivisions. The following statement of Mr. Justice McReynolds in the majority opinion is pertinent:

> "The Act has been assailed upon the ground that it is not in any proper sense a law on the subject of bankruptcies and therefore is beyond the power of Congress; also because it conflicts with the Fifth Amendment. Passing these, and other objections, we assume for this discussion that the enactment is adequately related to the general 'subject of bankruptcies.' See *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181, 46 L. Ed. 1113, 22 S. Ct. 857, 8 Am. Bankr. Rep. 9; *Continental Illinois Nat. Bank & T. Co.* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595, 27 Am. Bankr. Rep. (N. S.) 715; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106, 28 Am. Bankr. Rep. (N. S.) 397."
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> *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513, 527, 56 S. Ct. 892, 80 L. Ed. 1309, 1312 (1936).

Furthermore, since the opinion in the Bekins case there can be no doubt but that the first act was related to the general subject of bankruptcies. Mr. Chief Justice Hughes there said:

> "The bankruptcy power is exercised in relation to a matter normally within its province * * * etc."
>
> *United States* v. *Bekins, et al.*, 304 U. S. 27, 51, 58 S. Ct. 811, 82 L. Ed. 1137, 1144 (1938).

Jurisdiction over the subject-matter has been defined to be the right of the court to exercise judicial power over that class of cases—not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending, and not whether the particular

case is one that presents a cause of action or under the particular facts is triable in the court in which it is pending because of some inherent facts which exist and may be developed during the trial.

Peyton v. *Peyton*, 28 Wash. 278, 68 Pac. 757, 764 (1902);

Christiansen v. *Mendham*, 45 App. Div. 554, 61 N. Y. S. 326, 327 (1899);

Manley v. *Park*, 62 Kan. 553, 64 Pac. 28, 30 (1901).

We submit that the District Court in deciding the bankruptcy case was acting within its jurisdiction and that the plaintiffs here were properly before the court in that action. We submit that this is merely a case where the District Court may have made an erroneous decision from which there was no appeal, and that since that decision is still in full force and effect the plaintiffs are bound by it.

The Eighth Circuit Court of Appeals, in the case of *McWilliams* v. *Blackard*, 96 Fed. (2d) 43 (1938), had before it a case which presented the converse of the proposition presented in this case. It appeared there that the appellee, Blackard, had filed a petition for adjudication under Sub-Section (s) of Section 75 of the Bankruptcy Act (11 U.S.C. A., Section 203 (s)). The appellant resisted the granting of this petition on the ground that Sub-section (s) of Section 75 was unconstitutional, and, after the lower court had granted adjudication, appealed to the Circuit Court of Appeals, asserting the unconstitutionality of Sub-section (s). The Court of Appeals reversed the trial court, holding Subsection (s) of Section 75, as amended, unconstitutional, and directed the lower court to dismiss the debtor's petition. Pursuant thereto, the petition was dismissed by the lower court on December 11, 1936. Thereafter, on March 29, 1937,

the Supreme Court of the United States held that Sub-section (s) of Section 75 was constitutional. Following that decision, and on May 29, 1937, the debtor, Blackard, filed with the District Court his application for the reinstatement of his petition for adjudication under Sub-section (s) of Section 75, to which application the appellant entered a plea of *res judicata* based upon the prior decision of the Circuit Court of Appeals, from which there had been no appeal. The Trial Court held that the plea of *res judicata* was inapplicable, and McWilliams again appealed to the Circuit Court of Appeals. That court, in the case above cited, sustained the plea of *res judicata.*

> "Whatever may be the nature of a question presented for judicial determination,—whether depending on Federal, general, or local law,—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed." *Mitchell* v. *First Nat. Bank of Chicago,* 180 U. S. 471, 481, 21 S. Ct. 418, 422, 45 L. Ed. 627.
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> "Whenever the right and the duty of a court to exercise its jurisdiction depends upon the decisions of a question it has power to hear and determine, its judgment, right or wrong, is binding upon the parties and those in privity with them. *Foltz* v. *St. Louis & San Francisco Ry. Co.,* 8 Cir., 60 F. 316, 319; *Thompson* v. *Terminal Shares,* 8 Cir., 89 F. 2d 652, 655; *Wilcons* v. *Penn Mutual Life Ins. Co.,* 10 Cir., 91 F. 2d 417, 419. The power to decide includes the power to decide erroneously. *Simonitsch* v. *Bruce,* 8 Cir., 258 F. 331, 333; *Jack* v. *Hood,* 10 Cir., 39 F. 2d 594, 595."
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> "Whether a judgment is based upon the determination of a question of law or of a question of fact makes no difference with respect to its finality or effectiveness. It is a final judgment in either event. *Fauntleroy*

v. *Lum*, 210 U. S. 230, 237, 28 S. Ct. 641, 52 L. Ed. 1039; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 33 S. Ct. 410, 57 L. Ed. 716.

"We are convinced that the court below had no power to reinstate the petition of the appellee upon the theory that the decision of this court was not *res judicata*."

McWilliams v. *Blackard*, 96 Fed. (2d) 43, 45, 46 (1938).

Using that statement as the rule to be applied in this case, we submit that the District's plea of *res judicata* should be sustained. The right of the District Court to grant the relief prayed in the bankruptcy case depended upon the validity of the First Municipal Bankruptcy Act. The District Court had the right, power, and duty to hear and determine whether the act itself was constitutional, and whether under the terms of the act the District was entitled to relief, and according to the ruling stated in the above quoted case, that decision is binding upon the parties, whether it be right or wrong.

The District Court, in the bankruptcy case, passed on the above issues, and after so doing rendered its decree of March 28, 1936. That court had the power and the jurisdiction to pass upon the constitutionality of that statute. The District Court might have held that there was no cause of action because the act was void. It had jurisdiction of the case thus to decide. It would appear to be incontestable that a United States District Court does have the power and the jurisdiction to pass upon the validity of acts of Congress unless that power is expressly taken from it. Certainly its final decision is binding upon the parties in the absence of an appeal. If the rule were otherwise there would be no end to litigation.

An analogous situation is presented in the case of *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 116 (1938). That case involved the conclusiveness of an order of the United States District Court releasing a guarantor of certain bonds from his obligations in a proceeding under Section 77(b) of the Bankruptcy Act. The Supreme Court of the State of Illinois had refused to recognize the binding effect of said order on the theory that the United States District Court was without jurisdiction to render the order in question. On writ of certiorari to this court the decision of the Supreme Court of Illinois was reversed. This court assumed for the purpose of its decision that the Bankruptcy Court did not have jurisdiction of the subject-matter of the order. In an opinion delivered by Mr. Justice Reed, the court said:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creditors. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject-matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject-matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata*. After a Federal

court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject-matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

Upon principle, a court possesses power to determine whether it has authority to entertain a particular controversy, although its decision and the law be that it has no such authority, and it therefore dismisses the suit. Where the question is raised whether the court has jurisdiction to determine the controversy, that question itself calls for a judicial determination, and the decision is a judicial act and necessarily an exercise of jurisdiction.

See:

King v. *Poole*, 36 Barb. 242, 244 (N. Y., 1862).

The case of *Stoll* v. *Gottlieb* (*supra*) apparently places some stress upon the fact that the jurisdictional issue was actually raised in the case culminating in the contested decree.

The fact that the party asserting invalidity of the contested decree actually appeared in the court rendering it and contested the jurisdiction of the court should not be controlling. It should be sufficient that such party had an opportunity to appear and set up whatever defenses it might care to make. As a general principle, the doctrine of *res judicata* applies not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.

Dowell v. *Applegate*, 152 U. S. 327, 345, 14 S. Ct. 611, 38 L. Ed. 463, 470 (1894).

Cromwell v. *Sac County*, 94 U. S. 351, 24 L. Ed. 195 (1877).

Aurora v. *West*, 7 Wall. 82, 19 L. Ed. 42 (1869).

A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled.

Gila Bend Reservoir & Irrig. Co. v. *Gila Water Co.*, 205 U. S. 279, 27 S. Ct. 495, 51 L. Ed. 801 (1907).

It does not appear from the record in this case that the respondents, The Baxter State Bank and Mrs. Lena S. Shields, or either of them, appeared in the bankruptcy case. It does appear, however, that a great majority of the bondholders were represented in that proceeding (R. 27, 29).

The respondents were given ample notice of the time and place of the hearing (R. 15, 30, 32, 55) and therefore had opportunity to appear and be heard upon any issues they cared to raise. Admittedly, under the doctrine set out in the case of *Stoll* v. *Gottlieb*, had these respondents appeared and contested the jurisdiction of the court in the bankruptcy case they would be bound by its decision in the

absence of an appeal. We can conceive of no valid reason why they should be in any better position for not having done so. It might be that had they appeared and presented the argument they now make the court rendering the bankruptcy decree would have dismissed the proceeding. A party should be required to make timely objections. It is probably from similar considerations that the doctrine of *res judicata* is held applicable, not only as to every ground of recovery or defense actually presented, but also as to every ground which might have been presented. We can conceive of no sufficient reason why an exception to this doctrine should be made in this case.

In every case a court, which renders judgment against a defendant, asserts, at least tacitly, its jurisdiction over the parties and over the subject-matter.

See:

Chicago Life Insurance Co. v. *Cherry*, 244 U. S. 25, 29, 37 S. Ct. 492, 61 L. Ed. 966, 969 (1917);

Texas & P. R. Co. v. *Gulf C. & S. F. R. Co.*, 270 U. S. 266, 274, 46 S. Ct. 263, 70 L. Ed. 578, 582 (1926).

The case of *Dowell* v. *Applegate*, 152 U. S. 327, 14 S. Ct. 611, 38 L. Ed. 463, involved the title to certain lands, the plaintiff, Dowell, claiming under a decree of the Federal Circuit Court for the District of Oregon. The defendant contended that said decree was void, asserting that the Federal Circuit Court was without jurisdiction to determine said cause for the reason that no Federal question was involved and that all parties were citizens of the same state. For the purpose of its opinion this court assumed that the Federal Circuit Court was without jurisdiction

in the controversy, but, nevertheless, upheld its decree as *res judicata*. It was there said:

> "These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the circuit court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. *Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.* As said in *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.*, above cited, if the circuit court 'kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. *To determine whether the suit was removable in whole or in part or not, was certainly within the power of the circuit court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause.* Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal'." (Italics ours.)

> "This disposes of the first objection urged against the decree in the Federal Court under which Dowell purchased. That decree cannot be treated, in this suit, as void for want of jurisdiction."

In the case of *Cutler* v. *Huston*, 158 U. S. 423, 15 S. Ct. 868, 39 L. Ed. 1040 (1895), it was again urged that a judgment of the Circuit Court of the United States for the Western District of Michigan was void for the reason that there

was no diversity of citizenship. In reviewing this argument, this court said:

> "* * * while said judgment remains unreversed it is not a nullity, and cannot be collaterally attacked. This was held in *McCormick* v. *Sullivant*, 23 U. S. 10 Wheat. 192. That was a case where, to a bill brought in the circuit court of the United States to enforce a claim to real estate, the defendants filed a plea in bar to former proceedings in a United States court. To this there was a special replication alleging that the proceedings in such former suit were *coram non judice*, because the record did not show that the complainants and defendant in that suit were citizens of different states, and the court, through Mr. Justice Washington, said: 'This reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction, but they are not, on that account, inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities'; *Evers* v. *Watson, ante*, p. 520. Accordingly the decree was held to be a valid bar of the subsequent suit."

The Eighth Circuit Court of Appeals, in the case of *Hartford Life Insurance Co.* v. *Johnson*, 268 Fed. 30 (1920), stated:

> "'Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments, which entitle the complainant to any relief; and it may be the duty of the court to

determine either the question of jurisdiction or the merits of the controversy against the petitioner or plaintiff. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to the jurisdiction of the suit or proceedings.'

"It is the power to hear and determine the subject-matter in controversy which constitutes jurisdiction. *Rhode Island* v. *Massachusetts*, 37 U. S. (12 Pet.) 657, 718, 9 L. Ed. 1233; *Riggs* v. *Johnson County*, 73 U. S. (6 Wall.) 169, 187, 18 L. Ed. 768; *Foltz* v. *St. Louis, etc., Ry. Co.*, 60 Fed. 316, 8 C.C.A. 635. It does not depend upon the decision of the case. *Columbus Ry. Light & Power* v. *Columbus*, 249 U. S. 399, 406, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648.

"It is true the jurisdictional allegations of a complaint may be put in issue by proper plea, but even in such a case the court in deciding such a plea exercises jurisdiction. Even if it sustains its jurisdiction erroneously, the judgment is not subject to collateral attack, although cause for reversal upon appeal."

It appears in each of the above decisions that judgments were held binding on a plea of *res judicata*, even though the court rendering the judgment had no jurisdiction over the controversy. It may be, as stated by Mr. Justice Reed in the case of *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 116, that the controlling question in these cases is whether the court rendering the judgment or decree had "color of jurisdiction." To say the least, "color of jurisdiction" should add some dignity to the judgment.

In the case at bar the District Court rendering the bankruptcy decree was acting under and by virtue of a statute of Congress, which statute at the time the decree was rendered was in full force and effect. The court followed the statute strictly, and no complaint has been made as to

the procedure adopted. Certainly the court had "color of jurisdiction." The Federal Constitution provides that Congress shall create courts inferior to the Supreme Court, Article 1, Section 8; Article 3, Section 1. An Act of Congress, therefore, must establish at least a "color of jurisdiction."

In 15 C. J. 854, the following statement is made:

> "Where a statute conferring jurisdiction is held unconstitutional, such decision will have no retroactive effect on the principle, *communis error facit jus*, and where proceedings have been regularly had under the law as it existed before such decision they will not be disturbed."

In support of this statement, the text cites the case of *Herndon* v. *Moore*, 18 S. C. 339 (1882). That case involved the binding effect of a judgment of the Probate Court rendered in 1872 in a case to partition real estate. At the time of the judgment jurisdiction in said court for such purpose was provided by legislative act. In 1878, in a cause styled *Davenport* v. *Caldwell*, the Supreme Court of South Carolina held the act conferring jurisdiction was unconstitutional. Thereafter, this action was filed contesting the judgment of 1872. The court held that it was binding. It said:

> "It is urged that the sale for partition by the Probate Court in the case of Herndon, having been made prior to the decision in *Davenport* v. *Caldwell*, and while the jurisdiction of the Probate Court was generally recognized, should not be affected by that judgment. Certainly the judgment in that case only bound the parties before the court, but a decision of the Supreme Court upon a constitutional question, not only affects the case before the court, but stands as an authoritative construction of the clause interpreted, and, as a general rule, is conclusive upon other cases involving the same question.

"This is certainly true of all cases arising after the decision, and although in its effect upon cases decided before, there may be something of the element which makes *ex post facto* laws so objectionable, yet there is undoubtedly a difference in effect between repealing a valid law, and declaring that one in form never was law. In the former case all acts done and rights vested under the law before its repeal, will be maintained, while in the latter the declaration of unconstitutionality ordinarily reaches back to the date of the act itself. But there is an exception as to the class of cases in which, for sufficient reasons, the declaration of the unconstitutionality of a law is not allowed to have greater effect than a simple repeal sustaining all acts done and all judicial proceedings had under it before such declaration, in analogy to the principle of *res adjudicata*.

"In such case, rights acquired under an act having the form of law, are sustained, although the act be afterwards declared unconstitutional upon the principle involved in the maxim *communis error facit jus*. This proceeds upon the view that to annul everything done under an act solemnly passed by the lawmaking power of the State, generally received as valid and so expounded and administered by courts of justice, would operate as a fraud upon the parties thus misled. This doctrine, although exceptional in character, is well sustained by authority." (pages 353, 354.)

"* * * According to our view, the proceedings for partition of Herndon's estate, regularly had in the Probate Court, prior to the decision of *Davenport* v. *Caldwell*, should be held binding upon all parties concerned." (page 357.)

To the same effect, see:

Thomas v. *Poole*, 19 S. C. 323 (1882);

Schumpert v. *Smith*, 18 S. C. 358 (1882).

If the case at bar is actually a case wherein the District Court in the bankruptcy case did not have jurisdiction, then we submit that it certainly presents a situation

where the exception to the general rule should govern as was stated in the case of *Herndon* v. *Moore*, 18 S. C. 339 (1882).

In this case at least, and probably in many others, a great amount of money has been paid out in reliance on the validity of this decree. The Reconstruction Finance Corporation, and possibly other persons, have purchased bonds issued by improvement districts relying upon the fact that said bonds were a first lien on the lands within the district. If the respondents be permitted to prevail here, these persons who purchased in good faith will be relegated to the position of a second mortgagee. On the other hand, it will work no hardship on the respondents to sustain the District in the contentions it now makes. The respondents had an opportunity to set aside the decree now complained of by direct appeal. Had they come into court and taken an appeal, it is unlikely the new bonds would have been issued pending the appeal. At any rate, prospective purchasers would have been put on notice of adverse claims. Furthermore, the District itself would not have proceeded with its refinancing arrangements and thereby incurred great expense unnecessarily.

Instead, however, of protecting their rights in this manner, respondents elected to sit idly by and lull the District and the prospective purchasers of its bonds into a sense of security. They waited until after the District had fully completed its arrangements for refinancing; until after practically all its creditors had accepted the plan of reorganization; until the District's liabilities were so reduced in proportion to its assets as to make it almost certain that the District could pay respondents' securities in full if compelled by the courts so to do. Before making any move whatsoever, they waited for sixteen months after the bank-

ruptcy decree and for fourteen months after the decision of this court in the Ashton case.

If there is any exception to the general rule as stated in the case of *Herndon* v. *Moore*, 18 S. C. 339, *supra*, then this case should fall within it.

There is another line of decisions which in some respects pass on similar issues. These decisions are best exemplified by the case of *Woods Bros. Construction Co.* v. *Yankton County*, 54 Fed. (2d) 304 (C.C.A. 8, 1931), wherein the plaintiff company brought action in the United States District Court of South Dakota against the defendant, Yankton County, to recover compensation for certain construction work performed by plaintiff. The contract under which the work was done was entered into between the company and the Board of Commissioners of Yankton County, said commission proceeding by virtue of Chapter 193, Laws of 1921, relating to drainage districts. The District Court entered a judgment for the plaintiff on March 22, 1929. Subsequent thereto, and on May 7, 1929, the Supreme Court of South Dakota, in another, though similar, action, held that Chapter 193, Laws of 1921, was unconstitutional. Thereafter, and subsequent to the expiration of the term during which the judgment of March 22 was entered, the Board of County Commissioners filed a motion in the District Court for modification of said judgment. The District Court thereupon vacated its judgment of March 22, 1929, and dismissed the action. The trial court said:

> "That this court was without jurisdiction to try and determine any controversy between the parties hereto arising under said contract or under the pleadings in this action, because the court had no jurisdiction of the subject-matter in the absence of a law

under which the Board of County Commissioners could act."

From this action the plaintiff company appealed and secured a reversal. The Circuit Court of Appeals in its opinion said:

"We are unable to agree with the conclusions of the trial court. It seems clear to us that *at the time* judgment was entered jurisdiction existed in the federal court so to do. There was diversity of citizenship, the amount in controversy was sufficient, a legal right was asserted by appellant, and denied by appellees. 'Jurisdiction' has been defined in *Reynolds* v. *Stockton*, 140 U. S. 254, 268, 11 S. Ct. 773, 777, 35 L. Ed. 464, as 'the right to adjudicate concerning the subject-matter in the given case.' The test of jurisdiction is whether there was power to enter upon the inquiry. Surely there was a 'case' or 'controversy' here within the meaning of article 3 of the Constitution of the United States. The subject-matter which was in controversy was appellant's claim for compensation for services rendered to petitioners for the project and to the owners of the lands. The term 'subject-matter necessary to confer jurisdiction' means in the federal courts that a 'case' or 'controversy' within the meaning of article 3 of the Constitution of the United States is present. *It is not necessary that the right asserted be based upon a valid law. That question goes to the merits of the action and not to the jurisdiction of the court.* A federal court cannot refuse jurisdiction of a controversy because the constitutionality of a state statute may be involved. (Italics ours.)

"In *Flanders* v. *Coleman*, 250 U. S. 223, 227, 39 S. Ct. 472, 473, 63 L. Ed. 948, the court said: 'Whether the District Court has jurisdiction to grant any relief must be determined upon a consideration of the allegations of the bill and the amendment thereto. If there be enough of substance in them to require the court to hear and determine the cause, then jurisdiction should have been entertained.' And on page 228 of 250 U. S., 39 St. Ct. 472, 474, 63 L. Ed. 948: 'As this court has not

infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked."

"The judgment of March 22, 1929, was conclusive as to all issues raised by the pleadings, and those necessarily involved in the rights adjudicated thereunder. The validity of the 1921 amendment to the South Dakota Drainage Laws was raised by the pleadings and was necessarily involved in an adjudication that appellant had the right to recover. Both the county and the board of county commissioners pleaded that chapter 193 of the laws of 1921 was unconstitutional. The federal court had the power at that time to pass upon the validity of the South Dakota statutes under which the contract had been made. It was as competent in law to pass on the question as was the state court. Their constitutionality was an issue."

The situation in the Yankton case is not greatly different from that in the case at bar. It appears that in each case a judgment was entered, and, further, that said judgment was based upon an unconstitutional statute. Similarly, in each case after the judgment was rendered the statute upon which the judgment was based and relief given was declared unconstitutional by a superior court in unrelated cases. In the Yankton case this court held that the unconstitutionality of the statute as subsequently determined made no difference whatever; that in spite of this the prior judgment was valid and binding for the reason that at the time judgment was entered jurisdiction existed in the court rendering said judgment.

At the time the Federal District Court in Arkansas rendered its decree on March 28, 1936, it did possess jurisdiction both of the parties and of the subject-matter. At that time the act had not been declared unconstitutional. The question of the constitutionality of the act could have been

presented to the District Court in the action therein pending. Whether such question was actually presented makes no difference. The court had jurisdiction to pass on the and determine that question. It is almost unquestionable that the District had the power to determine the issues presented in the bankruptcy case. Whether the court should have given the relief sought by the plaintiff in that case is a question entirely different from that as to whether the court had jurisdiction. It so happens that the court may have erred in granting the relief sought by the petitioner, the drainage district in that case, but this was an error subject to correction only by appeal.

Another similar case is that of *Arnold* v. *Booth*, 14 Wis. 180 (1861), which was an action to recover property seized under execution on a judgment. The issue presented was whether the judgment upon which the execution was based and which was rendered by the United States District Court for Wisconsin in a suit under the Fugitive Slave Law of 1850, was binding. The plaintiff argued that the District Court was a court of limited jurisdiction, and, as the Fugitive Slave Law had been declared unconstitutional, the judgment was a nullity and subject to collateral attack, because the record showed the subject-matter in controversy in the District Court was solely the recovery of a penalty given for the violation of an unconstitutional law. It was held that the judgment of the Federal District Court was, nevertheless, binding, the court reasoning as follows:

> "Obviously the cause of action in the suit of Garland against Booth was a penalty given by the Fugitive Slave Law for a violation of its provisions. *But whether there was any law in existence giving this right of action, and, if so, whether the law was valid and binding, were legitimate matters of consideration for the dis-*

trict court, as was the question of its violation. The court might have held that there was no cause of action because the law was void. It had jurisdiction of the case thus to decide. This it seems to me is incontestable. I do not wish to be understood as saying that a court may give itself jurisdiction by deciding that it has it, or that other courts would be concluded by such a decision when that question came before them. For this would be merely holding that the exercise of power by a court proved the rightful exercise of such power—a proposition for which no one would probably contend. I am endeavoring to make obvious to others, what is plain to my own mind, namely, that the question arising upon the record offered in evidence is not really one going to the jurisdiction of the district court, but one touching the question as to whether in fact there was any cause of action. If I am right in this view of the case, it would then follow that the decision of that court holding that a good cause of action existed, however erroneous, must be binding until reversed.

"* * * it seems to me that it is analogous in principle, and that the same rule must apply here that is held to apply in cases where the jurisdiction of a court extends over a class of cases but the court gives judgment in a particular case where the facts and law do not authorize it."

See also:

Rooker v. *Fidelity Co.*, 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923);

Buckmaster v. *Carlin*, 3 Scammon (Ill.) 104 (1841);

Watertown v. *Eastern Dakota Electric Co.*, 296 Fed. 832 (C.C.A. 8, 1924);

Putman v. *Murden*, 97 Ind. App. 313, 184 N. E. 796 (1933).

The theory of the above line of decisions is that where the judgment in controversy is based upon a statute, which later in a different controversy, is declared to be unconstitutional, still the prior judgment remains in full force

and effect in the absence of an appeal. The theory of these cases is that the validity of the statute is a question going to the merits of the controversy and not one going to the jurisdiction of the court. Admittedly, in the absence of a valid act the court could not legally render its judgment, but the validity or invalidity of the statute upon which the cause of action is based is just as much a fact to be established as any other fact necessary to be proved in the case.

In the case at bar the Drainage District filed its petition in bankruptcy in the United States District Court. This court admittedly had jurisdiction over bankruptcies, and the subject-matter of the suit was one related to the general subject of bankruptcies.

Ashton v. *Cameron County Water Improvement District*, 298 U. S. 513, 56 S. Ct. 892, 80 L. Ed. 1309 (1936);

United States v. *Bekins, et al*, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137, 1144 (1938).

The creditors of the district were brought before the court in the same manner as in other bankruptcy actions and in accordance with the act itself. The District in that proceeding asserted a cause of action. Its right to relief was, of course, dependent upon the statute. It pleaded this statute and also all other facts necessary to entitle it to the relief prayed. The present respondents were parties to that proceeding, whether or not they made formal appearance, and they now assert that the statute upon which the District relied was unconstitutional. It is submitted that their argument is one going to the merits of that conroversy and not one directed to the jurisdiction of the court. They might just as well in this case attack the decree rendered therein because the Drainage District, in the bankruptcy

proceeding, did not prove some other fact necessary to its case. Yet, if that was the basis of the present attack on said decree, we take it this case would present no difficulty, inasmuch as all the authorities are agreed that under such circumstances the prior decree is binding.

Point C

THE CONSTITUTIONAL OBJECTIONS WHICH EXISTED IN THE ASHTON CASE WERE NOT PRESENT IN THE BANKRUPTCY CASE AT ISSUE HERE, AND EVEN IF SAID OBJECTIONS WERE PRESENT, THE RESPONDENTS COULD NOT HAVE RAISED THEM UPON DIRECT APPEAL

Up to this point in this brief we have argued that the decree in the bankruptcy case was not wholly void, that it is not subject to collateral attack, and that it is *res judicata* of every issue in this case. In this section of the brief it is argued that the respondents can accomplish no more by collateral attack on the bankruptcy decree than could have been accomplished by them by direct appeal, and that had the respondents appealed from the bankruptcy decree, said decree would have been affirmed.

In the first place, the unconstitutionality of the statute must be especially pleaded, and the failure so to do would constitute a waiver of any defense on that ground.

Wong Tai v. *U. S.*, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545 (1927);

New York Ex Rel. v. *Kleinert*, 268 U. S. 646, 45 S. Ct. 618, 69 L. Ed. 1135 (1925);

Young v. *Masci*, 289 U. S. 253, 53 S. Ct. 599, 77 L. Ed. 1158 (1933).

The respondents filed no pleading in the district court at the time the bankruptcy proceedings were had. Therefore, under the well established rules of this court, no constitutional questions could have been argued upon appeal.

Furthermore, the status of Chicot County Drainage District is quite different from that of Cameron County Water Improvement District No. 1, and had respondents appealed from the bankruptcy decree, it is very questionable whether this court would have held the First Municipal Bankruptcy Act unconstitutional in so far as it applied to the petitioner drainage district. The act by its terms applied "to any municipality or other political sub-division of any state, including (but not hereby limiting the generality of the foregoing) any county, city, burrough, village, parish, town or township, unincorporated tax or special assessment district, and any school, drainage, irrigation, reclamation, levee, sewer, or paving, sanitary, port, improvement, or other districts." U. S. C. A. Title 11, Section 303 (a).

Sub-division (L) is the separability clause and reads as follows:

> "If any provision of this chapter *or the application thereof to any person* or circumstances is held invalid, the remainder of the chapter, *or the application of such provision to other persons* or circumstances, shall not be affected thereby." (Italics ours.)

The decision in the Ashton case is based upon the finding that Cameron County Water Improvement District No. 1 was a political sub-division of the state. The court said:

> "It is plain enough that respondent is a political sub-division of the state, created for the local exercise of her sovereign powers and that the right to borrow money is essential to its operations. * * * Its fiscal af-

fairs are those of the state not subject to control or interference by the national government unless the right so to do is definitely accorded by the federal constitution."

See also:

Brush v. *Commissioner of Int. Rev.*, 300 U. S. 352, 368; 81 L. Ed. 691, 698 (1937).

The situation of Chicot County Drainage District is entirely different. This district is not a political sub-division of the State of Arkansas, and the objection to the act which was raised in the Ashton case probably would not have arisen in the bankruptcy case here had it been appealed, and the constitutional issue raised.

In the case of *Drainage District No. 7 of Poinsett County* v. *Hutchins*, 184 Ark. 521, 530, 42 S. W. (2d) 996, 1000, the Supreme Court of Arkansas defined drainage districts as "the agent of the property owners in the district whose interests are affected by the duties they perform. They exercise no governmental powers except those expressly or impliedly granted by the Legislature. They are not political or civil divisions of the state like counties and municipal corporations created to aid in the general administration of the government. They are not created for political purposes or for the administration of civil government."

See also:

In re Drainage District No. 7 of Poinsett County, Arkansas, 21 Fed. Sup. 798, 803 (1937);

Drainage District No. 2 of Crittenden County, Ark., v. *Mercantile Commerce Bank & Trust Co.*, 69 Fed. (2d) 138 (C.C.A. 8, 1934), cert. den. 293 U. S. 566, 55 S. Ct. 77, 79 L. Ed. 665.

This precise question was raised in the case of *Luehrmann et al. v. Drainage District No. 7 of Poinsett County, Arkansas*, 104 Fed. (2d) 696 (C.C.A. 8, 1939). In this case the Drainage District filed a debt composition proceeding pursuant to the provisions of the Second Municipal Bankruptcy Act (11 U.S.C.A., Sections 401-404). The court sustained the constitutionality of the act as applied to the case at issue and pointed out the difference between a drainage district in Arkansas and the Water Improvement District which was involved in the Ashton case. The court said:

> "A former Act (May 24, 1934, 11 U. S. C. A., Sections 301-303) permitting municipal corporations and other political subdivisions of states, unable to pay their debts as they mature, to resort to the federal courts of bankruptcy to effect readjustment of obligations, was before the Supreme Court in *Ashton* v. *Cameron County Water Improvement District No, 1*, 298 U. S. 513, 56 S. Ct. 892, 80 L. Ed. 1309. It was there held that the power claimed in support of the Act, as applied to the district organized to permit water for irrigation and domestic purposes, having power to sue and be sued, issue bonds, and levy and collect taxes, was unconstitutional, as restricting the states in the control of their fiscal affairs. The appellant district there was held to be a political subdivision of the state.
>
> "The Act of August 16, 1937, under which this proceeding was brought, undertakes to meet the constitutional weakness of the former Act by the following provision: 'That if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance, is held invalid, the remainder of the chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be affected by such holding.' 11 U. S. C. A., Section 401.
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> "In *Drainage District No. 2 of Crittenden County, Arkansas*, v. *Mercantile-Commerce Bank & Trust Company*, 8 Cir., 69 F. 2d 138, this court held that an

Arkansas Drainage District is not a governmental agency as respects the question of whether the district is subject to equity jurisdiction. This ruling is based upon the decisions of the Supreme Court of Arkansas holding that drainage districts are *quasi*-public corporations which are not political or civil divisions of the state like counties and municipal corporations created to aid in the general administration of the government. They are not created for political purposes, nor for the administration of the government. Appellants do not contend that the petitioner falls within the limitation upon the power springing from this amendment to the Bankruptcy Act, which limitation was declared in the Ashton case."

As heretofore pointed out, the first act contained a separability clause which was similar to that contained in the second act. The first act was not, therefore, unconstitutional in its application to Chicot County Drainage District of Chicot County, Arkansas. It did not, as applied to that District, interfere with any rights of the State of Arkansas or of any of its political subdivisions.

The constitutional question which was raised in the Ashton case and which was held to be sufficient to make the act unconstitutional probably could not have been raised in this case had an appeal been taken from the bankruptcy decree.

See:

Iroquois Transp. Co. v. *De Laney Forge & Iron Co.*, 205 U. S. 354, 360, 27 S. Ct. 509, 51 L. Ed. 836, 840 (1907);

Champlin Refining Co. v. *Corporation Comm.*, 286 U. S. 210, 234, 238; 52 S. Ct. 559; 76 L. Ed. 1062, 1078, 1080 (1932);

Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8, 22; 52 S. Ct. 103; 76 L. Ed. 136, 145 (1931);

Utah Power & Light Co. v. *Pfast*, 286 U. S. 165, 186; 52 S. Ct. 548; 76 L. Ed. 1038, 1049 (1932);

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 583; 57 S. Ct. 524; 81 L. Ed. 814, 819 (1937);

Young v. *McNeal-Edwards Co.*, 283 U. S. 398, 400; 51 S. Ct. 538; 75 L. Ed. 1140, 1141 (1931).

We do not suggest that this court should retry the bankruptcy case upon its merits. The doctrine of *res judicata* no doubt, was originally adopted for the very purpose of obviating the continual retrial of cases. We merely suggest these points in order to more clearly demonstrate the fallacy of the decisions in the lower courts. We submit that in order to circumvent the plea of *res judicata* a party must clearly demonstrate that the court rendering the judgment pleaded as an estoppel was without jurisdiction and that in any case where there arises even a suspicion that upon appeal from the original judgment the judgment would have been affirmed, then, in such case, the doctrine of *res judicata* must be held to apply.

There is one further point that might be mentioned in connection with this controversy. It has been suggested by at least one federal court that the decision in the Bekins case completely reverses that in the Ashton case.

Supreme Forest Woodmen Circle, et al., v. *City of Belton, Texas*, 100 Fed. (2d) 655 (C.C.A. 5, 1938).

If this conclusion of the Circuit Court of Appeals for the Fifth Circuit is correct, then the decision in the Ashton case concludes no one other than the parties to that controversy. Reasoning further from that conclusion, the court rendering the decree in controversy here acted in a

regular manner and in all respects within its jurisdiction, and its final decree is conclusive on the parties to this action and necessitates a reversal of this cause.

CONCLUSION

We have argued in this brief three main issues. If the petitioner prevails on any one of these issues, this cause should be reversed with directions that the complaint be dismissed. After disposing of the question as to whether this cause and that determined in the bankruptcy proceeding were between the same parties and involved the same subject-matter, we argued, first, that the District Court in rendering the bankruptcy decree acted within its jurisdiction, and that its decree is now in full force and effect, just as conclusively as if the First Municipal Bankruptcy Act had been held constitutional in the Ashton case. In support of this argument, we referred to the cases of *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 116 (1938); *McWilliams* v. *Blackard*, 96 Fed. (2d) 43, 45, 46 (1938), and related cases. It is the theory of these cases that a court has the power to interpret the language of the jurisdictional instrument and its application to the issue before the court; that whether the judgment of the court is based upon the determination of a question of law or a question of fact makes no difference with respect to its finality or conclusiveness; and that the very act of the trial court in passing upon its jurisdiction was a judicial act and necessarily an exercise of jurisdiction and was binding upon the parties. We further argued in line with *Woods Brothers Construction Company* v. *Yankton County*, 54 Fed. (2d) 304 (C.C.A. 8, 1931), and *Arnold* v. *Booth*, 14 Wis. 180 (1861), that the constitutionality of the statute was a mat-

ter going to the merits of the controversy and not really a question relating to the jurisdiction of the court.

Secondly, we argued, relying upon *Dowell* v. *Applegate*, 152 U. S. 327, 345, 14 Sup. Ct. 611, 38 L. Ed. 463, 470 (1893), *Herndon* v. *Moore*, 18 S. C. 339 (1882), and other similar cases, that even though the court rendering the decree in bankruptcy acted in excess of its jurisdiction, still said judgment is binding upon the parties.

Thirdly, it was argued that the First Municipal Bankruptcy Act as applied to this petitioner was not unconstitutional; that had there been a direct appeal from the bankruptcy decree there is serious doubt as to whether it would have been reversed, and that respondents cannot be permitted to accomplish by collateral attack on that decree something which they could not have accomplished by direct appeal.

Judge Woodrough, in his dissenting opinion in the Circuit Court of Appeals, 103 Fed. (2d) 847, 849 (R. 89), summarized this case in an able manner. In commenting on the status of the act between the time of its enactment and the time it was declared unconstitutional, he stated:

> "But it seems to me that our duly constituted courts, sitting in the various districts and circuits throughout the nation, functioning in equity, law or bankruptcy, remained clothed with judicial power, including the power to pass on the constitutionality of the law and that their solemn judgments in all cases, including bankruptcy cases, ought to be given full faith and credit unless appealed from and reversed. The amendment to the Bankruptcy Act affected very large property rights. I think it ought not to be held that there was a *hiatus* of governmental power in respect to them, or that the Supreme Court decision annulling the amendment operated retroactively to render void

the final unappealed from judgments of all the courts that had passed on the amendment and adjudicated rights between litigants in respect to it. It ought to be held that government by law is continuous at least in the courts of the nation" (R. 89-90).

We therefore respectfully pray that this cause be reversed and remanded with directions.

Respectfully submitted,

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